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No. 88-958

In the Supreme Court of the United States

OCTOBER TERM, 1988

ARTHUR JAMES COOPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner, who obtained money from his employer by means of false representations, was properly convicted of violating the wire fraud statute, 18 U.S.C. 1343.

2. Whether petitioner obstructed justice under 18 U.S.C. 1503 by attempting to induce another person to commit perjury on his behalf.

3. Whether the district court erred in its evidentiary rulings.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A1-A5) is reported at 860 F.2d 1076 (Table). The opinion of the district court (Pet. App. A26-A42) is reported at 677 F. Supp. 778.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1988. A rehearing petition was denied on October 5, 1988. The petition for a writ of certiorari was filed on November 10, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Delaware, petitioner was convicted on 39 counts of wire fraud, in violation of 18 U.S.C. 1343,

and one count of obstruction of justice, in violation of 18 U.S.C. 1503. He was sentenced to concurrent one-year terms of imprisonment on each wire fraud count, and to a concurrent four-year term of imprisonment on the obstruction of justice count. The court of appeals affirmed. Pet. App. A1-A5.

The evidence at trial is summarized in the government's brief in the court of appeals (Gov't C.A. Br. 3-8). It showed that petitioner worked as the primary timekeeper for Southern Stevedoring Company between September 1984 and February 1986. On 67 days during that period, petitioner's son Timothy was listed as the timekeeper on Southern Stevedoring's payroll timesheets, even though he was a high school student at the time and had never worked as a timekeeper. Timothy was paid by Southern Stevedoring for those days. On 62 of those 67 days, petitioner worked as the timekeeper for one of the other two stevedoring companies operating at the Port of Wilmington and was paid by one of those companies. None of the companies would have permitted petitioner to work for two companies at the same time. Gov't C.A. Br. 4-7. The false representation that petitioner's son Timothy was working as a timekeeper for Southern Stevedoring formed the basis for the wire fraud charges against petitioner.

Following his indictment, petitioner met with a terminal supervisor, Ken Scheffel, and asked him to testify that Timothy had worked for Southern Stevedoring as a "runner." Scheffel told petitioner that he did know what a runner was and that he would not perjure himself. Scheffel subsequently reported petitioner's contact to his manager, and the contact became the subject of the obstruction of justice count against petitioner. Gov't C.A. Br. 7-8.

ARGUMENT

1. Relying on this Court's decision in *McNally* v. *United States,* 483 U.S. 350 (1987), petitioner contends (Pet. 22-28) that his conduct did not constitute fraud. Specifically, he maintains that Southern Stevedoring suffered no monetary loss as a result of his misrepresentations regarding his son's employment because it would have had to pay someone to perform timekeeper duties in any event, and that for that reason his wire fraud convictions cannot stand under *McNally.* There is no merit to this contention.

In *McNally,* this Court reversed the defendants' mail fraud convictions, which had been based on the theory that their conduct had deprived the citizens of Kentucky of their intangible right to honest and impartial government. Subsequently, in *Carpenter* v. *United States,* No. 86-422 (Nov. 16, 1987), this Court upheld the wire fraud conviction of a writer of a column for the Wall Street Journal who traded on his knowledge of what the column would say. The Court made clear, contrary to petitioner's contention, that a scheme to defraud does not require proof that the victim of the scheme lost money, but only requires that he was deprived of a property interest of some kind. Slip op. 7. Here Southern Stevedoring was deprived of the right it had paid for—the exclusive services of a full-time timekeeper—rather than, at best, sharing petitioner's services with other employers. That interest constitutes a property right at least as readily cognizable as the interest at issue in *Carpenter*—the Wall Street Journal's right to exclusive control over the information it would publish.

Moreover, as the district court concluded (Pet. App. A32-A42), the jury in this case, unlike the jury in *McNally,* was instructed under the second clause of the wire fraud statute, which proscribes schemes to obtain money by false representations. (The first clause, which was at

issue in *McNally,* proscribes schemes to defraud.)[1] While under *McNally* the victim of a "scheme or artifice to defraud" must be deprived of a property interest, proof that a victim sustained a property loss has never been required under the second clause of the fraud statutes. All that is required by that clause is that the defendant's scheme contemplate that he would obtain money or property by means of misrepresentations.

In any event, there is no reason to grant review in this case to determine whether petitioner's conduct violated the mail and wire fraud statutes as construed in *McNally.* Congress recently amended the federal fraud statutes to provide that a " 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right to honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603 (Nov. 18, 1988). The legislative history of the new provision explains that "[t]his section overturns the decision in *McNally* v. *United States* * * *. The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change." 134 Cong. Rec. S17375 (daily ed. Nov. 10, 1988). Thus, the question whether fraud convictions of the type at issue in this case are consistent with *McNally* is of no prospective importance.

2. Petitioner also contends (Pet. 28-33) that his conviction for obstruction of justice under 18 U.S.C. 1503 must be reversed because witness tampering does not violate Section 1503, but is barred only by 18 U.S.C. 1512. There is no merit to that contention.

Section 1512 prohibits the use of physical force, threats, or "misleading conduct" against witnesses to influence

[1] The wire fraud statute, like the mail fraud statute, proscribes "any scheme or artifice to defraud, *or* for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1343 (emphasis added).

their testimony or prevent them from testifying. It does not reach other efforts to induce a witness to remain silent or commit perjury. Conduct of that sort falls within the reach of Section 1503, the general obstruction of justice statute. When Section 1512 was enacted in 1982, Section 1503 was amended to delete express references to witnesses. However, Section 1503's "omnibus" or "residual" clause, which generally prohibits "influenc[ing], obstruct-[ing], or imped[ing], or endeavor[ing] to influence, obstruct, or impede, the due administration of justice," was not amended. By retaining that clause, Congress left undisturbed decisions holding that Section 1503 reaches efforts to obstruct the administration of justice by influencing witnesses for corrupt purposes. See, *e.g.*, *United States* v. *Johnson,* 605 F.2d 729, 730-731 (4th Cir. 1979), cert. denied, 444 U.S. 1020 (1980). If Section 1503 were not construed to cover acts of influencing witnesses other than those covered by Section 1512, there would be a serious gap in the statutory coverage. Not surprisingly, no court has held that such conduct falls outside the reach of Section 1503. See, *e.g.*, *United States* v. *King,* 762 F.2d 232, 236-238 (2d Cir. 1985), cert. denied, 475 U.S. 1018 (1986).

Petitioner notes (Pet. 30) that there is a conflict among the circuits on a related issue—whether witness intimidation of a type that *does* fall within Section 1512 is also covered by the omnibus clause of Section 1503. The Second Circuit has held that Section 1512 is the exclusive remedy for such conduct. See *United States* v. *Hernandez,* 730 F.2d 895 (1984). Every other circuit that has addressed the issue has held that acts of witness intimidation that violate Section 1512 may also be prosecuted under the omnibus clause of Section 1503. See *United States* v. *Branch,* 850 F.2d 1080 (5th Cir. 1988), cert. denied, No. 88-5565 (Jan. 9, 1989); *United States* v. *Risken,* 788 F.2d 1361 (8th Cir.), cert. denied, 479 U.S. 923 (1986); *United States* v.

Rovetuso, 768 F.2d 809 (7th Cir. 1985), cert. denied, 474 U.S. 1076 (1986); *United States* v. *Lester,* 749 F.2d 1288, 1291-1296 (9th Cir. 1984). While we believe that the majority rule is correct, there is no need to address that question in this case because even the Second Circuit agrees that conduct of the sort involved in this case—conduct directed toward witnesses that does not fall within the reach of Section 1512—is within the scope of Section 1503. See *United States* v. *King, supra.* There is therefore no conflict among the circuits on the issue presented in this case.

Petitioner also contends (Pet. 30-33) that the evidence does not support his conviction for obstruction of justice. He maintains that he merely asked Scheffel to be a witness on his behalf, and did not try to influence his testimony. But Scheffel testified that petitioner asked him to testify falsely that petitioner's son Timothy served as a "runner" for Southern Stevedoring and that Scheffel immediately told petitioner that he would not perjure himself on petitioner's behalf. Pet. App. A98-A106. From that evidence, the jury properly concluded that petitioner attempted to induce Scheffel to commit perjury at petitioner's upcoming trial.

3. Finally, petitioner contends (Pet. 33-44) that the district court erred in several of its evidentiary rulings.

First, petitioner complains (Pet. 33-39) that Scheffel's testimony (Pet. App. A122-A124) that he had noted irregularities on Southern Stevedoring's timesheets (other than the listing of petitioner's son Timothy as a timekeeper) unfairly prejudiced petitioner. But Scheffel did not mention petitioner in the brief testimony about which petitioner complains, and petitioner did not object to that testimony at trial. This claim of error therefore could not possibly justify reversal of petitioner's conviction.

Petitioner next suggests (Pet. 39-40) that the district court should not have admitted into evidence proof that petitioner was paid by other stevedoring companies on 62 of the 67 days that he falsely listed his son Timothy as Southern Stevedoring's timekeeper. In petitioner's view, that evidence was "irrelevant" (Pet. 39). To the contrary, that evidence was highly relevant, as it showed how petitioner profited from his fraudulent scheme, by obtaining double compensation for his work.

Finally, petitioner argues (Pet. 40-42) that the district court unfairly prevented him from establishing as a defense that working for two employers at the same time, or "doubling," was permitted at the Port of Wilmington. But petitioner's son Anthony testified that he had received notices suggesting that doubling was permitted, and he read into evidence a letter allegedly approving doubling. The district court merely barred the introduction of a similar letter during cross-examination of another witness on the proper ground that Fed. R. Evid. 608 bars impeaching a witness with extrinsic evidence. Pet. App. A118-A121. The district court also ruled, on hearsay and remoteness grounds, that a union official could not testify that two other people had agreed that doubling was permitted in the mid-1970s. The court held that the official could testify to anything he personally observed at the Port of Wilmington (*id.* at A112, A115). Those rulings each correctly applied the governing evidentiary principles. Petitioner accordingly has no ground for complaint.[2]

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[2] Petitioner also contends briefly (Pet. 42-43) that the court permitted the government undue latitude in cross-examining defense witnesses. He does not specify why he believes the cross-examination of any defense witness was improper. Contrary to his suggestion, the rules of evidence permit a witness to be cross-examined about acts of misconduct if the evidence bears on the witness's credibility. See Fed. R. Evid. 608(b).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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